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Issue Date: 28 February 2007

CASE NO.: 2006-LHC-00065

OWCP NO.: 01-148700

In the Matter of

M.S.¹

Claimant

v.

ELECTRIC BOAT CORPORATION

Employer/Self-Insured

Appearances:

Aram P. Jarrett, III (Chisholm, Chisholm & Kilpatrick),
Providence, Rhode Island, for the Claimant

Conrad M. Cutcliffe (Cutcliffe, Glavin & Archetto),
Providence, Rhode Island, for the Employer

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS ON MODIFICATION

I. Statement of the Case

The Claimant in this matter was employed by the Electric Boat Corporation (“EBC”) for 23 years as a shipyard tool room attendant until December 14, 1999. On that date, she suffered an incapacitating anxiety attack at work, and she brought a claim under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (the “LHWCA”), for temporary total disability compensation, alleging disability due to work-related stress. In a decision and order issued on August 9, 2001 in Case No. 2000-LHC-03236, Administrative Law Judge Daniel J. Roketenetz found that the Claimant had sustained a work-related psychological injury for which she was awarded temporary total disability compensation benefits. In the

¹ In accordance with Claimant Name Policy which became effective on August 1, 2006, the Office of Administrative Law Judges uses a claimant’s initials in published decisions in lieu of the claimant’s full name. See Chief ALJ Memorandum dated July 3, 2006 available at http://www.oalj.dol.gov/PUBLIC/RULES_OF_PRACTICE/REFERENCES/MISCELLANEOUS/CLAIMANT_NAME_POLICY_PUBLIC_ANNOUNCEMENT.PDF.

instant proceeding, EBC moves under section 22 of the LHWCA to modify the prior award to temporary partial disability based on its contention that any disability currently preventing the Claimant from working cannot be causally related to her past employment at EBC. 33 U.S.C. § 922. EBC further contends that the Claimant now has an earnings capacity and is no longer totally disabled. The Claimant avers that she continues to be totally disabled by injuries caused by her employment at EBC, and she has cross-moved for modification of her benefits to permanent total disability.

After transfer of the modification proceeding from the District Director, Office of Workers' Compensation Programs ("OWCP") to the Office of Administrative Law Judges ("OALJ"), a formal hearing on the modification requests was conducted in Providence, Rhode Island on March 24, 2006 and May 19, 2006, at which time all interested parties were given the opportunity to present evidence and oral argument. 33 U.S.C. § 919(d). The Claimant and the Employer appeared at the hearing with counsel. The Claimant offered testimony from herself and a vocational expert, and the Employer called two witnesses, a vocational expert and a psychiatrist. Documentary evidence was admitted as Claimant Exhibits ("CX") 1 and 3-15, EBC Exhibits ("EX") 1-13, and stipulations were entered as Joint Exhibit ("JX") 1. The Employer's objection to CX 2, the transcript of the hearing before Judge Roketenetz, was taken under advisement pending review of the record and the parties' briefs. *See* March 24, 2006 Transcript (hereinafter "TR1") at 11-13.² Both parties submitted post-hearing briefs, and record is now closed.³

Upon review of the evidence of record and the parties' arguments, I conclude that the Employer had not shown that sufficient grounds exist for modification of the prior compensation award. I further find that the Claimant has established entitlement to modification, and I will modify the prior award to permanent total disability compensation. My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

The parties have stipulated to the following: (1) the Act applies to the claim; (2) the injury occurred on December 14, 1999; (3) the injury occurred at EBC in Quonset, Rhode Island; (4) the injury arose out of and in the course of the Claimant's employment with the EBC; (5) there was an employee/employer relationship at the time of the injuries; (6) the Employer was timely notified of the injuries; (7) the claim for benefits was timely filed; (8) the Notice of Controversion was timely filed; (9) the Claimant's average weekly wage at the time of the injury was \$835.00; (10) EBC has paid the Claimant temporary total disability compensation since December 15, 1999 pursuant to Judge Roketenetz's decision and order; and (11) the Claimant has not returned to her usual job. JX 1 at 1-2. The issues presented by EBC are: (1) whether the Claimant's present disability is caused, aggravated or accelerated by the incident on December

² The transcript of the March 24, 2006 hearing will be referred to as "TR1" and the transcript of the May 19, 2006 hearing will be referred to as "TR2."

³ The Claimant did not cite the transcript of the prior hearing in her brief or offer any further argument in support of admission. In the absence of any showing of relevance, EBC's objection is sustained, and CX 2 is excluded from evidence.

14, 1999; (2) whether the Claimant has reached maximum medical improvement; and (3) the nature and extent of the Claimant's disability. EBC Brief at 8. The issues presented by the Claimant are: (1) whether EBC remains liable for the Claimant's disability; (2) whether the Claimant's disability is permanent and total, not temporary and partial; (3) and whether EBC is liable to pay for the Claimant's medical treatment. Claimant Brief at 1.

III. Findings of Fact and Conclusions of Law

Under section 22 of the LHWCA, an interested party may, at any time within one year of the last payment of compensation or within one year of the rejection of a claim, request modification on the ground of a change in conditions or because of a mistake in a determination of fact. 33 U.S.C. § 922. "[T]raditional notions of *res judicata* do not govern § 22 modification proceedings, which may be brought whenever 'changed conditions or a mistake in a determination of fact makes such modification desirable in order to render justice under the act.'" *Bath Iron Works Corp. v. Director, OWCP*, 244 F.3d 222, 227 (1st Cir. 2001) (quoting *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255 (1971)). As Judge K.K. Hall of the Fourth Circuit observed, the inapplicability of *res judicata* to disability cases makes particular sense because "[t]he health of a human being is not susceptible to once in a lifetime adjudication." *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1362 (4th Cir. 1996), *cert. denied*, 519 U.S. 1090 (1997). The modification procedure thus provides an ALJ with "broad discretion to revisit issues already decided and, if appropriate, 'to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.'" *Bath Iron Works*, 244 F.3d at 227 (quoting *O'Keeffe*, 404 U.S. at 256). However, an ALJ's authority to reconsider a prior determination is not unlimited. "Parties should not be permitted to invoke § 22 to correct errors or misjudgments of counsel." *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 26 (1st Cir. 1982) (rejecting employer's attempt to use section 22 to raise a claim of limited liability under section 8(f) which it had failed to raise in the initial proceeding on the claim). Moreover, the Benefits Review Board has consistently held that "[s]ection 22 is not intended to be a back door for retrying or relitigating an issue which could have been raised in the initial proceedings." *Feld v. General Dynamics Corp.*, 34 BRBS 131, 134 (2000) (holding that evidence of suitable alternative employment that the employer declined to offer at the initial hearing is insufficient as a matter of law to establish a change in the claimant's economic condition warranting modification of a total disability compensation award). *See also Lombardi v. Universal Maritime Service Corp.*, 32 BRBS 83, 86 (1998).

In this case, neither EBC nor the Claimant contends that there was any mistake of fact in the prior decision. Rather, they both assert that there has been a change in conditions warranting modification of Judge Roketenetz's award of temporary total disability compensation. Specifically, EBC argues that any mental disability currently affecting the Claimant is due to personal and family factors that are not causally related to her past employment. EBC also argues that the Claimant has regained an earning capacity so that her compensation status should be changed to temporary partial disability, while the Claimant counters that her disability has become permanent and remains total. Modification based on a change in condition may be granted when a claimant's physical or economic condition has either improved or deteriorated following an award of compensation. *Wynn v. Clevenger Corp.*, 21 BRBS 290, 292 (1988),

citing *Fleetwood v. Newport News Shipbuilding and Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985). A prior award may be modified under section 22 where there is a change in the employee's wage-earning capacity, even without any change in the employee's physical condition. *Metropolitan Stevedoring Co. v. Rambo*, 515 U.S. 291, 301 (1995). See also *Ramirez v. Southern Stevedores*, 25 BRBS 260, 265 (1992) (holding that there is no requirement that the economic change be "substantial"); *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49, 51-52 (ALJ erred in denying employer's motion for modification where employer alleged that claimant underwent vocational rehabilitation that equipped him with qualifications for jobs that were previously unavailable to him). The party seeking modification has the burden of establishing that modification is appropriate. *Jensen v. Weeks Marine, Inc.*, 346 F3d 273, 277 (2d Cir. 2003); *Vasquez v. Universal Maritime of San Francisco, Inc.*, 23 BRBS 428, 430 (1990). Once a party has introduced sufficient evidence to show a change in conditions, the standards for determining disability are identical to those applied during an initial hearing under the Act. *Vasquez*, 23 BRBS at 431 (1990). Accordingly, the evidence relating to the Claimant's current physical, psychological and economic condition must be considered in light of her condition at the time of the prior proceeding to determine whether either party has established that there has been a change warranting modification of the prior award of temporary total disability compensation.

A. Judge Roketenetz's Findings and Award

Judge Roketenetz found that the Claimant made out a *prima facie* case that she had suffered a psychological injury and that conditions at EBC (*i.e.*, a stressful job combined with harassment by a co-worker and EBC's failure to accommodate the Claimant's physical limitations) caused or aggravated her psychological condition. Decision and Order at 14-15. Judge Roketenetz further found that the Claimant's *prima facie* case invoked the presumption of compensability contained in section 20 of the LHWCA and that EBC had not met its burden of producing substantial evidence to sever the presumed connection between the Claimant's psychological condition and her working conditions at EBC. *Id.* at 15-19. Judge Roketenetz noted that every physician and psychologist of record had determined that the Claimant was presently unable to return to work, and he found she was totally disabled since EBC had not introduced any evidence of suitable alternative employment. *Id.* at 21. Finally, Judge Roketenetz found that the Claimant had not met her burden of establishing that her disability was permanent, and he awarded her temporary total disability compensation and medical care. *Id.* at 21-22.

B. Evidence of the Claimant's Current Condition

1. The Claimant's Testimony

The Claimant has not returned to work at EBC since the December 14, 1999 panic attack, but she did visit the shipyard on several occasions between 2000 and 2002 when she drove her husband, an EBC employee, to work after he had suffered a leg injury that prevented him from driving, and when she went to EBC to be fitted for eyeglasses. TR1 at 58-59, 77-81. She testified that she suffered an anxiety attack on one of these visits to EBC when there was some type of emergency situation while she was at the guard shack. *Id.* at 59. She has continued to

receive treatment from psychologist Clifford Bromberg, Ph.D. and psychiatrists Steven Singer, M.D. and David Kahn, M.D. whose records and opinions are discussed below. *Id.* at 38-39, 43. She also continues on a regime of anti-depressant and anxiety medications, and she testified that these medications cause tremors and affect her memory and concentration. *Id.* at 40-44.

The Claimant's activities since 2000 have centered around family care responsibilities and her continued participation in a long-term hobby of attending "renaissance" fairs with her husband. Regarding her family responsibilities, she testified that her late parents owned a farm, the ownership of which was being contested in probate court at the time of the hearing. TR1 at 47-48. The Claimant's husband maintains the property, and one of the Claimant's friends currently lives on the farm and cares for the animals including a horse owned by the Claimant. *Id.* at 48-49. The Claimant testified that she has occasionally ridden the horse with her grandson while another adult had the horse on a lead. *Id.* at 49, 71-74. She has also used a riding lawnmower as well as a lawn tractor on the farm to mow lawns and fields and to haul brush that was loaded by her husband and friend. *Id.* at 87-89.

In 2003, the Claimant's mother died, and she began living on the farm to care for her father, who suffered from end stage Parkinson's Disease, until his death approximately eight months later. TR1 at 82-83, 106. She received assistance from a nurse and elder care technician, but personally put in two six-hour shifts each day to attend to her father's needs which included management of a feeding tube. *Id.* at 86, 106-107. A home health aide handled dishes, laundry, washing and changing, but the Claimant drove to pick up medical supplies at a local hospital. *Id.* at 86.

The Claimant also spends a significant amount of time babysitting a three-year-old grandson. She testified that she has her grandson for one or two days each week from 1:00 p.m. to 10:00 p.m. while her daughter works at a shopping mall. TR1 at 50, 65. The Claimant's daughter drops the child at the Claimant's house at 1:00 p.m., and he remains there with the Claimant and her husband until approximately 8:00 p.m. when she drives him home to her daughter's house, which is located approximately one quarter to one half mile away, and puts him to bed. *Id.* at 50-51, 65. She reads to the grandson, drives to the store and brings him with her on visits to her late parents' farm. *Id.* at 51-52, 64-69.

In addition to her family activities, the Claimant has continued to pursue a hobby of participating along with her husband as costumed period characters in "renaissance fairs." TR1 at 55-57. She testified that this activity has been encouraged by Drs. Bromberg and Kahn. *Id.* at 58. She and her husband travel to annual fairs in Massachusetts, New York and Florida which are attended by large crowds of people. *Id.* at 60, 76, 89-91. She and her husband have also participated in "live dungeons and dragons" games which involve a group traveling through a maze while attempting to avoid traps laid out by a "villain." *Id.* at 93. The Claimant testified that participation in these events involves interaction with crowds, but she explained that she does not feel uncomfortable because she is always accompanied by friends and her husband who plays the role of her "protector." *Id.* at 61-62, 97-99.

2. Medical Evidence⁴

Subsequent to the hearing before Judge Roketenetz, EBC had the Claimant referred for an psychiatric evaluation by Leah Oseas Cullen, M.D. on April 8, 2003. EX 2. It had the Claimant undergo a second evaluation in January of 2004 by Ronald Mark Stewart, M.D. EX 4. EBC offered these reports, along with vocational evidence, and the testimony of Dr. Stewart at the hearing in support of its motion for modification. The Claimant responds with reports and deposition testimony from her treating psychologist, Clifford Bromberg, Ph.D., and her treating psychiatrist, David Kahn, M.D. CX 8-11.

Dr. Cullen

Dr. Cullen evaluated the Claimant on April 8, 2003 and examined her history and available records in a detailed report of that date. EX 2. Her diagnostic impression was Bipolar Type II Disorder with Agoraphobia and Post-Traumatic Stress Disorder (“PTSD”). *Id.* at 7.⁵ Dr. Cullen stated that it appeared that the Claimant was totally disabled from “any and all gainful employment at the current time . . . [including] her job at Electric Boat and any other sedentary employment, even if only for 3 ½ hours a day.” *Id.* She explained that the Claimant was “too emotionally labile and her sleep and mood too erratic to allow her to sustain gainful employment.” *Id.* Dr. Cullen continued that bipolar disorder, by definition, cannot be caused by work stress, and she added that “the most that can be said is that the illness was exacerbated by work-related stress.” *Id.* She did not specifically address the etiology of the Claimant’s agoraphobia and PTSD. She discussed the Claimant’s multiple family stressors and speculated that the Claimant would “probably regress” and see a worsening of her condition when her then terminally ill father died. *Id.* Dr. Cullen stated that the Claimant’s agoraphobia was partially controlled by medication, and she reported that the Claimant could leave her house if accompanied by a “phobic partner” (*i.e.*, someone she knows well and trusts to protect her). *Id.* Regarding the Claimant’s employability, Dr. Cullen stated that it was doubtful that the Claimant could sustain employment anywhere now that she had been approved for Social Security disability and “become acclimated” to her disabled state. *Id.* at 8. Dr. Cullen noted that the Claimant brought up the possibility of working at home, and she stated that this could be pursued if the Claimant’s treating psychologist and psychiatrist felt that she were stable enough to address the issue. *Id.* Dr. Cullen continued that the Claimant would require ongoing psychotherapy for at least another two years and medication management indefinitely. *Id.* She stated that the Claimant’s treatment to date had been appropriate and necessary, and she concluded that the Claimant had not reached a point of maximum medical improvement because “[s]he has not remained psychiatrically stable for any significant length of time.” *Id.* Dr. Cullen’s report indicates that she is board-certified in psychiatry and neurology, and she is an assistant clinical professor of psychiatry and human behavior at Brown University. *Id.*

⁴ The parties introduced a large volume of medical records covering the period of 1999 to the present. While all of this evidence had been reviewed and considered herein, I have limited the summary to the more recent medical records and opinions which bear on the Claimant’s condition subsequent to the prior decision as this evidence is most probative of whether there has been a change warranting modification.

⁵ These impressions are listed at Axis I. Dr. Cullen stated that she deferred any Axis II diagnosis, indicating that a Mixed Personality Disorder with Histrionic and Borderline Features should be ruled out. EX 2 at 7.

Dr. Bromberg

Dr. Bromberg also testified at a deposition taken on January 23, 2006. CX 8. He confirmed that he is a licensed psychologist who has been treating the Claimant with psychotherapy on a biweekly basis since January of 2000. *Id.* at 4-5. He also confirmed that when he first saw the Claimant in January of 2000, she presented with symptoms of anxiety and depression and that the acute stressor at that time was work-related stress. *Id.* at 5. Dr. Bromberg testified that the Claimant's present diagnosis is panic disorder with agoraphobia or avoidance of public places, major depression which is episodic, and dysthymia which is a more chronic, baseline form of depression. *Id.* at 6-7. He added that this diagnosis has been the same over the six years that he has been treating the Claimant with the exception of dysthymia which he added after observing over time that the Claimant suffered from chronic depression. *Id.* at 7-8. He acknowledged that the Claimant has other stressors in her life such as family conflicts, the deaths of her parents and litigation over the probate of their estates, and her own surgery for cancer. *Id.* at 9-10. However, he stated that he remained of the opinion that the Claimant is not capable of returning to her former position at EBC because the stress of the workplace would cause significant anxiety and depression symptoms. *Id.* at 10-11. He also stated that it is his opinion that there continues to be a causal relationship between the Claimant's work at EBC and her psychiatric disability because "[w]ork stress was causal in the development of her symptoms, and those have been chronic symptoms" *Id.* at 11. Dr. Bromberg further testified that it would be fair to say that the Claimant had reached a point of maximum medical improvement after six years of treatment. *Id.* at 12.⁶

On cross-examination by EBC's attorney, Dr. Bromberg testified that the Claimant is currently taking Clonidine which has had positive effects of easing her tension and making her presentation more "perky and upbeat." *Id.* at 16-17. He also testified that the Claimant would need to be on this medication for a longer period of time before he could fairly evaluate whether her condition is going to improve further. *Id.* at 17-18.⁷ He agreed that the Claimant currently has stressors from family relationships, her health and issues related to her parents' estate, but he noted that her caring for her grandson, although stressful at times, has been a major positive factor in her life. *Id.* at 18-19, 26-27. He was asked whether the Claimant had improved over the course of six years of treatment, and he responded that she had both improved and regressed and that she had not "significantly" improved since 2000. *Id.* at 21. Dr. Bromberg acknowledged that his office notes over the past five and one half years only contain a few references to EBC in the context of discussions of the workers' compensation claim, and he agreed that he had not diagnosed the Claimant with PTSD, though he noted that she had reported possible symptoms of anxiety or "flashback" on the occasions when she had gone back to EBC after December 14, 1999. *Id.* at 22-23. He further agreed that the Claimant's employment at EBC had not been a "primary focus" of his therapy over the last five and one-half years but pointed out that he had discussed EBC with the Claimant. *Id.* at 27. Dr. Bromberg disagreed

⁶ EBC's objection to the question eliciting this testimony, presumably on the basis that the question called for a legal conclusion, is overruled. Whether the Claimant has reached a point of maximum medical improvement is a medical question which Dr. Bromberg is clearly qualified to answer as the Claimant's treating psychologist. *See Dixon v. John J. McMullen & Assocs.*, 19 BRBS 243, 245 (1986); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985).

⁷ The Claimant's objection to this question is overruled.

with the proposition that the effects of a traumatic event necessarily fade with time, explaining that a traumatic event can have an impact that becomes chronic. *Id.* at 28. He also disagreed that the traumatic events that led up to her leaving employment at EBC had “faded” from her memory, countering that the Claimant has a “vivid” memory of the stresses at EBC, though she is now temporally removed from those events. *Id.* at 28-29. He did agree that the Claimant had been able to successfully work at EBC for many years despite having experienced a number of traumatic events in her earlier life, but he declined to characterize those past stresses as more severe than what she encountered at EBC. *Id.* at 28. Dr. Bromberg confirmed that he had dropped agoraphobia from the Claimant’s diagnosis in June of 2003, explaining that she had improved at that point of time in terms of her discomfort at being in public places, but he added that the Claimant continues to have symptoms of agoraphobia. *Id.* at 30-31. He was questioned about the Claimant’s anxiety related to her employment at EBC, and he responded that the anxiety was caused by a fear of inability to meet the physical demands of the jobs and by stress from a “hostile work environment” where she was subjected to sexual harassment and had difficulty getting along with a co-worker. *Id.* at 33-34. Dr. Bromberg testified that the Claimant could “theoretically” work out of her own house. *Id.* at 36.⁸ He said that he could not objectively determine whether the Claimant actually suffered panic attacks because he is not present when the attacks occur, but he stated that he did not find the Claimant to be melodramatic and did not believe that she was exaggerating symptoms or malingering. *Id.* at 36-38. Finally, he agreed that it is “possible” that economics could be a factor in the Claimant’s case, but he stated that he had ruled out malingering. *Id.* at 40-41.

In a letter to the Claimant’s attorney dated February 21, 2006, Dr. Bromberg addressed a labor market survey (EX 6) that had been conducted for EBC by a vocational consultant. CX 10. While Dr. Bromberg agreed that the Claimant possessed the requisite skills for performing the jobs listed in the labor market survey, he expressed concern that the survey did not give “adequate consideration . . . to the degree to which her performance may be hindered by aspects of her depression and panic disorder, and the degree to which performing these jobs may exacerbate her psychiatric symptoms.” *Id.* He stated that the Claimant’s depression caused concentration and fatigue problems which could limit her ability to perform jobs such as an envelope stuffer and proofreader, and he wrote that jobs that would require interaction with the public could trigger panic attacks. *Id.* Dr. Bromberg noted that the Claimant even experienced panic attacks while engaging in leisure activities such as the renaissance fairs that he has encouraged since her husband and friends are present for support, and he stated that he is “concerned that within the context of a job situation devoid of positive associations and social support, the stress associated with public outings with a performance demand may elicit more frequent and severe panic attacks than [she] experiences at the renaissance fairs.” *Id.*

Dr. Kahn

At his deposition on December 19, 2005, Dr. Kahn testified that he is board-certified in psychiatry and has been in practice for 15 years. CX 10 at 4-5. He has been treating the Claimant since October 8, 2002. *Id.* at 7. He reviewed the Claimant’s history and noted that the Claimant began reporting depressive symptoms and panic attacks related to stress at work as early as December of 1999 and that she appeared to be very vulnerable to stresses from that point

⁸ The Claimant’s objection to this question is overruled.

forward. *Id.* at 10. His initial diagnosis was PTSD, and he testified that it is his opinion that this condition was triggered by stressors that the Claimant experienced at work. *Id.* at 11-13. Dr. Kahn was asked to consider the Claimant's job responsibilities at EBC, and he testified that it is his opinion that she was unable to perform those duties at the time that he first saw her in 2002. *Id.* at 13-14. Thus, it is also his opinion that there is a causal relationship between the Claimant's disability and the stressors that she experienced while working at EBC. *Id.* at 14.

Dr. Kahn next addressed his ongoing treatment and said that he sees the Claimant every two to four weeks. CX 10 at 14. He stated that the Claimant continues to suffer from panic attacks and anxiety and that she is currently on multiple medications to help control her symptoms. *Id.* at 23-24. It continues to be his opinion within a reasonable degree of medical certainty that the Claimant's diagnosis is PTSD and that the Claimant's treatment is reasonably necessary. *Id.* at 25. Dr. Kahn further testified that the Claimant might experience some improvement in the future, but not significant improvement, so it is his opinion that she has reached a point of maximum medical improvement. *Id.* at 26-27. He stated that it is his opinion that the Claimant continues to be disabled from her employment at EBC and that her present disability is related to the stressors that she experienced while working at EBC. *Id.* at 27.

On cross-examination by EBC's attorney, Dr. Kahn was questioned about his diagnosis of PTSD, and he agreed that the Claimant was not diagnosed with PTSD prior to 2002. CX 10 at 30-31. However, he explained that the Claimant had been diagnosed with an anxiety disorder "not otherwise specified" which meant that her anxiety had not previously been categorized. *Id.*⁹ He was questioned about the Claimant's panic attack of December 14, 1999 and agreed that it was associated with arrhythmia. *Id.* at 32. He acknowledged that it is possible that arrhythmia could precipitate a panic attack but said that it is his opinion, in light of the absence of any other signs of cardiac dysfunction, that the Claimant's arrhythmia was precipitated by the panic attack. *Id.* at 33. Dr. Kahn testified that he considered and ruled out malingering as a factor in the Claimant's case because he did not find that the Claimant's symptoms were exaggerated. *Id.* at 36-39, 42. However, he did allow that he found the Claimant to have a "slight tendency to melodrama" in her description of her experiences and attitudes. *Id.* at 40. He was also asked whether he had considered other diagnoses such as Bipolar Type II, and he responded that he was aware that Bipolar Type II had been considered in the past and that he concluded that she did not fit the diagnostic criteria because she did not experience hypomanic episodes characterized by reduced need for sleep, pressured speech and abnormal goal-oriented activity. *Id.* at 40-41. Dr. Kahn agreed that he had no independent corroboration of the Claimant's reported panic attacks, and he agreed memory of a traumatic event fades in many, but not all, PTSD cases. *Id.* at 43-44, 46. He said that the Claimant's agoraphobia remains a "moderate to significant" impairment, though her condition had improved since 2002 in that her frequency of panic attacks had reduced to less than weekly, and she is less anxious about leaving her home. *Id.* at 48-51. He was asked about the Claimant's participation in renaissance fairs and commented that it is possible that the Claimant is more tolerant of crowds in an outdoor situation. *Id.* at 51-52. Finally, he testified over the objection of the Claimant's attorney that if the Claimant were able to work at home, then she could work at home. *Id.* at 55.

⁹ It is noted that Dr. Cullen also diagnosed the Claimant with PTSD. EX 2 at 7.

In a post-deposition letter dated March 16, 2006, Dr. Kahn clarified his testimony regarding the Claimant's ability to work at home, stating that his statement about working at home had been taken out of context and that it is his opinion that the Claimant is not capable of gainful employment from her home or any other location. CX 11. He also stated that he had reviewed the jobs identified in EBC's labor market survey but was of the opinion that the Claimant "is in no condition to avail herself of any of these employment opportunities." *Id.* at 2.

Dr. Stewart

Dr. Stewart evaluated the Claimant and reviewed her medical records on December 16, 2004, and he set forth his findings and conclusions in a letter to EBC dated January 4, 2005. EX 3. He concluded that the Claimant suffers from major depressive disorder and panic disorder. *Id.* at 2. He added that she experiences typical symptoms of depression including depressed mood, impaired concentration, social withdrawal and sleep disturbance. *Id.* He noted that she reported a recent increase in panic attacks which she related to recent family losses and stressors, and he stated,

It is highly unlikely that the panic attacks are the result of a co-worker leaving a door open or not accommodating her in the manner she would like on the job. Many individuals who suffer from major depression also develop symptoms of panic disorder. One cannot attribute the cause of panic attacks to one specific incident or individual. These occur spontaneously and often remit in the same way.

Id. Rather, Dr. Stewart attributed the Claimant's current symptoms to the more recent family stressors in her life, and he stated that he is "in agreement with Dr. Harrop's opinion that the source of [the Claimant's] depression and panic attacks is outside of the workplace [and] is not causally related to what she perceived happened in mid-December of 1999 when she states a co-worker made it difficult for her to work with her injuries." *Id.* at 2-3. He concluded that the Claimant needed ongoing treatment for depression and panic and that she had not reached maximum medical improvement. *Id.* at 3. He further concluded that the Claimant is totally disabled for work and that her "current disability is not due to the alleged injury of 12/14/99." *Id.* Dr. Stewart's *curriculum vitae* indicates that he is a board-certified medical examiner specializing in geriatric and forensic psychiatry. EX 4. He has been in practice since 1973 and holds appointments as a clinical research fellow at the Harvard Medical School and as a part-time clinical instructor in psychiatry at the Tufts University Medical School. *Id.* He testified at the hearing that he has been qualified as an expert witness in federal and state courts in Massachusetts and Rhode Island. TR1 at 120.

Dr. Stewart testified at the formal hearing after listening to the Claimant's testimony. He stated that his diagnosis for the Claimant is major depression and that he disagrees with Dr. Kahn's diagnosis of PTSD which is characterized, according to the Diagnostic and Statistical Manual of Mental Disorders, by a "catastrophe" such as a person being exposed to a "bombing" or "witnessing a child being dismembered or witnesses dismemberment or is in a fire." *Id.* at

113-115.¹⁰ Dr. Stewart stated that the Claimant's testimony at the hearing is not consistent with agoraphobia because "she didn't have any noticeable acute anxiety symptoms . . . didn't hyperventilate . . . didn't become short of breath . . . didn't need to stop the proceedings . . . didn't really require medication . . . was composed . . . alert . . . answered the questions appropriately." *Id.* at 115-116. He also said that the Claimant's testimony about going to EBC for eyeglasses after 1999 is not consistent with panic attacks related to a past traumatic event at EBC. *Id.* at 172. Dr. Stewart testified that the Claimant's depressive symptoms began "[a]s early as 1998, according to the records of Dr. Kahn, as evidenced in the report of Dr. Cullen dated 4/8/03." *Id.* at 117. He also noted that "Dr. Harrop stated in his report of 4/12, 'The patient had sought treatment for depression in early December of 1999' and in parentheses, 'before her last day of work.'" *Id.* Dr. Stewart then testified that it is his opinion within a reasonable degree of medical certainty that the Claimant's major depressive illness and subsequent panic disorders are not now causally related to or aggravated, exacerbated or accelerated by the December 14, 1999 incident at EBC. *Id.* at 120-122. In support of this opinion, he explained that the Claimant's stressors since 2001 are the cause of her current condition: "all of her deaths, the deaths she's experienced, all the other mishaps and problems she's had with a variety of medications all – all speak to her major depression and anxiety." *Id.* at 121. Dr. Stewart said that it is his opinion that the Claimant has not reached a point of maximum medical improvement in light of her recent medication change to Clonidine and the possibility that she may improve further. *Id.* at 122-123, 145. Next, Dr. Stewart testified that he had changed his opinion on the Claimant's disability status:

Q. Have you had a chance now to review her deposition, listen to her testimony this morning, read the reports of Mr. Calandra and Mr. Barchi [vocational experts retained, respectively, by EBC and the Claimant], and do you have an opinion today as to her disability status?

A. Yes, I Have.

Q. What is that, Doctor?

A. I don't believe she's disabled to that extent at this time. She's not totally disabled. Her vocational assessments and the job search they did come up with some plausible opportunities. She obviously is articulate, can sustain pressure. She did in this courtroom for two hours of testimony. And, she also clearly has a significant history of participating in these fairs, which I've been to some of these, not this specific fair, but similar type of fairs. And just the walking and the — and the attention one has to pay, to stay from getting injured at these things, are pretty demanding. And, she's also been astride a horse and has also had babysitting chores and has had elder care chores which at best are very difficult and taxing. She shops. She operates a motor vehicle. She can operate a computer. She gives a good account of herself. Her attention span is good. Her memory is good. I think she certainly has several strengths which could be used in the work force.

¹⁰ An excerpt from the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM IV") on Anxiety Disorders was placed in evidence. EX 10. DSM IV describes PTSD as "characterized by the reexperiencing of an extremely traumatic event accompanied by symptoms of increased arousal and by avoidance of stimuli associated with the trauma." *Id.* at 2.

Id. at 123-124.¹¹ As further support of his revised opinion, Dr. Stewart cited the Claimant's "heroic care" of her father, responsibilities that he described as "terribly demanding." *Id.* at 128. Dr. Stewart further testified that if the Claimant has any current employment disability it is not in any way related to the workplace incident of December 14, 1999:

Q. Assuming [the Claimant] does have some psychiatric partial disability at this time, is that disability in any way related to the incident at Electric Boat on 12/14/1999?

A. No, it isn't.

Q. And why not, Doctor?

A. From what I've heard of the incident, what I've been told of the incident, it does not rise to the level of stress which could possibly induce these types of symptoms in the presence of other stressors which clearly would . . . [C]onflict with a co-worker, or a co-worker being in some way malicious or unpleasant does not produce major depression, does not produce panic disorders, does not produce PTSD.

* * * * *

Q. And doctor going over the same essential question, did you find that partial disability would be accelerated, aggravated or exacerbated with respect to the prior answer?

A. It would not.

Q. And is that opinion to a reasonable medical certainty?

A. Yes, it is.

Id. at 125-127. On cross-examination, Dr. Stewart agreed that much of the information that he relied upon to change his opinion regarding the Claimant's level of disability is contained in the transcript of the Claimant's pre-hearing deposition which he reviewed prior to his own deposition where he expressed the opinion that the Claimant is totally disabled. *Id.* at 154-157. However, he explained that more detail concerning the precise nature of the Claimant's participation in renaissance fairs was related at the hearing. *Id.* at 157. Lastly, on redirect examination, Dr. Stewart raised the possibility that the Claimant's apparent "histrionic" responses to stress were not entirely involuntary: "It's something I, of course, consider with people who have theatrical training and who have theatrical experiences and do gain from their – from their certainly types of behavior, which is dramatic." *Id.* at 174-175.

C. Has EBC established a change in the Claimant's condition?

EBC argues that the Claimant's condition has changed in two material respects since Judge Roketenetz's decision: (1) her present psychological condition is not caused, aggravated or accelerated by the incident of December 14, 1999; and (2) she is no longer totally disabled. "Where a party seeks modification based on a change in condition, an initial determination must be made as to whether the petitioning party has met the threshold requirement by offering evidence demonstrating that there has been a change in the claimant's condition." *Jensen v.*

¹¹ As previously discussed, Dr. Stewart concluded in his January 4, 2005 report to EBC that the Claimant was totally disabled. EX 3 at 3. He reiterated this opinion at a pre-hearing deposition taken on January 5, 2006. CX 13 at 29, 47.

Weeks Marine, Inc., 34 BRBS 147, 149 (2000) (*Jensen II*), *aff'd*, 346 F.3d. 273 (2d Cir. 2003). “This initial inquiry does not involve a weighing of the relevant evidence of record, but rather is limited to a consideration of whether the newly submitted evidence is . . . sufficient to bring the claim within the scope of Section 22.” *Id.* EBC has introduced Dr. Stewart’s opinions that the Claimant’s current mental impairment and any disability are not causally related to the events of December 14, 1999 and that the Claimant is no longer totally disabled. This evidence is clearly sufficient to satisfy EBC’s initial burden of producing evidence of a change and, thus, bring the case within the scope of the section 22 modification provisions. *Jensen II*, 34 BRBS at 150. Consequently, the analysis now shifts to the second step which requires a determination as to “whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a change in the claimant’s physical or economic condition from the time of the initial award to the time modification is sought.” *Id.* at 149.

After consideration of all the relevant evidence, I am persuaded that Dr. Stewart’s opinions are outweighed by the contrary opinions from Drs. Bromberg, Kahn and Cullen which I find to be better supported by the record as a whole. In this regard, I find that Dr. Stewart was too narrowly focused on the incident of December 14, 1999 and the Claimant’s conflicts with a single co-worker which led him to conclude, as did Dr. Harrop in the initial proceeding, that the Claimant’s employment at EBC plays no role in her current mental illness and disability. As discussed above, Dr. Stewart testified at the hearing the Claimant’s major depressive illness and subsequent panic disorders are not now causally related to or aggravated, exacerbated or accelerated by “the panic attack on 12/14/1999” but rather are attributable to the Claimant’s multiple non-occupational stressors since 2001. TR1 at 120-122. Dr. Stewart also wrote in his January 4, 2005 report that “[i]t is highly unlikely that the panic attacks are the result of a co-worker leaving a door open or not accommodating her in the manner she would like on the job.” EX 3 at 2. Contrary to Dr. Stewart’s assumptions, Judge Roketenetz found that the evidence establishes that the Claimant was under “a number of work-related and non-work-related stressors” at the time that she suffered the panic attack on December 14, 1999. Decision and Order at 14. Those work-related stressors included “incidents arising out of her work relationship with [the co-worker], inadequate accommodations made for disabilities, and the overall stressful nature of her position.” *Id.* According to Dr. Bromberg, they also involved a hostile work environment where the Claimant was subjected to sexual harassment, and Dr. Cullen noted the Claimant’s disturbing account of sexual harassment and fear of assault at EBC that long predated the events of December 14, 1999. CX 8 at 33-34; EX 2 at 3. In my view, Dr. Stewart gave inadequate consideration to the Claimant’s work-related stressors outside of the particular events of December 14, 1999 and her difficulties with the co-worker to which he seemingly ascribed minimal import. In fairness to Dr. Stewart, this is a difficult case as evidenced by the array of different diagnoses placed on Claimant, and it may well be that his diagnosis of a major depressive disorder is more appropriate than Dr. Kahn’s diagnosis of PTSD. In addition, Dr. Stewart makes a number of reasonable observations about the contribution from stressors in the Claimant’s personal life which appear unrelated to her employment at EBC. However, the issue here is not which diagnostic label is correct, or even whether non-occupational factors contribute to the Claimant’s current illness and disability. The question for determining whether modification is appropriate is whether the evidence establishes that there has been such a change in the Claimant’s condition that stressors related to her past employment at EBC are no longer causing, contributing to or aggravating her mental impairment. Since I find

that Drs. Bromberg and Kahn gave more thorough consideration to all of the work-related stressors experienced by the Claimant, I credit their opinions, which are generally corroborated by Dr. Cullen, and conclude that the weight of the evidence establishes that the Claimant's mental condition and disability continue to be caused or aggravated by her past employment experiences at EBC.

On the question of whether the Claimant continues to be totally disabled, the experts are in sharp disagreement. Once again the dividing line runs between Dr. Stewart, who initially believed the Claimant was totally disabled but changed his mind at the hearing, and Drs. Bromberg, Kahn and Cullen who all concluded that the Claimant continues to be totally disabled. The difference in opinion is clearly attributable to the fact that Dr. Stewart observed the Claimant while she was in the witness box for approximately two hours and revised his disability conclusions largely based on his assessment of her demeanor, while the other experts were not present at the hearing. In this respect, it could be said that Dr. Stewart has an advantage over the others because he had additional information available to him. But, does access to this additional information tip the balance in favor of his opinion? While Dr. Stewart reasonably explained the specific bases for the change in his view of the Claimant's disability status, I nonetheless conclude that his opinion is outweighed by the total disability findings made by Drs. Bromberg, Kahn and Cullen. I find it noteworthy that all of the doctors, including Dr. Stewart, were in agreement prior to the hearing that the Claimant continues to be totally disabled from any gainful employment. Dr. Stewart agreed that he was already aware of most of information regarding the Claimant's functioning prior to the hearing, so it is apparent that he changed his mind based on his observation that the Claimant was composed, articulate and focused as a witness. Indeed, these observations are consistent with the Court's. However, I am not convinced that a witnesses' performance during a two-hour period in a courtroom provides substantial evidence of employability that can overcome the reasoned opinions from the treating psychiatrist and psychologist and from another consulting psychiatrist who found the Claimant to be incapable of any gainful employment based on their review of the record of her progress over the course of years. I emphasize here that I am not substituting my lay judgment for that of the qualified medical professionals. I am only finding that the opinions of Drs. Bromberg, Kahn and Cullen are, on balance, better reasoned and more persuasive than the views offered by Dr. Stewart at the hearing. That is not to say that I am free of all doubt. There is certainly evidence that the Claimant's condition has improved somewhat since 1999 and that she is capable of attending to significant familial responsibilities. Moreover, given these improvements and the Claimant's obvious intelligence and other strengths, it is reasonable to expect that she might continue to improve in the future to the point that she could be deemed employable. However, based on my assessment of the evidence in this record, and giving greater weight to the opinions from Drs. Bromberg, Kahn and Cullen, I find that the Claimant had not reached that point at the time the record closed. Consequently, I conclude that EBC has not established that modification of the prior award is warranted by a change in the Claimant's physical or economic condition.¹²

¹² EBC's vocational evidence which includes a labor market survey and testimony of a vocational expert does not require a different result as the evidence of suitable alternative employment is predicated on an assumption that the Claimant is physically and mentally capable of competitive employment.

D. Has the Claimant established a change in her condition?

In her effort to obtain modification of her award to permanent total disability compensation, the Claimant, like EBC, satisfies the threshold requirement of producing evidence of a change based on the opinions of Drs. Bromberg and Kahn that she has now reached a point of maximum medical improvement. “To be considered permanent, a disability need not be ‘eternal or everlasting;’ it is sufficient that the ‘condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.’” *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 781 (1st Cir. 1979) (quoting *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968)). In *Air America*, the Court upheld a finding of permanency where the claimant’s symptoms had persisted for over three years and where the medical evidence, while indicating that some improvement had occurred and probably would continue, did not indicate that recovery was expected, and where there was no prediction that the claimant would be sufficiently cured to return to his pre-injury job. 597 F.2d at 781. In this case, the Claimant’s symptoms have persisted over seven years, and while there is medical evidence that her condition has improved and may well continue to improve, especially with the new medication, I find that her condition has persisted for a sufficient duration to be considered “permanent” under the LHWCA. Accordingly, the Claimant has established entitlement to modification. The effective date will be December 19, 2005 when Dr. Kahn testified at his deposition that the Claimant had reached a point of maximum medical improvement.¹³

E. Conclusions

1. Modification

As EBC has not established a change in the Claimant’s condition warranting modification, it will remain liable for the Claimant’s compensation. EBC will also remain responsible for the Claimant’s therapy from Dr. Bromberg and psychiatric care from Dr. Kahn since the evidence establishes that this care is reasonable and necessary for a condition that continues to be partially work-related. See *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Kelley v. Bureau of National Affairs*, 20 BRBS 169, 172 (1988). The Claimant has established that her disability has changed from temporary to permanent; therefore, the prior award of temporary total disability compensation will be modified.

2. Credit

Section 14(j) of the Act provides that “[i]f the employer has made advance payments of compensation, she shall be entitled to be reimbursed out of any unpaid installment or installment of compensation due.” 33 U.S.C § 914(j). This provision allows the employer a credit for its prior payments of compensation against any compensation subsequently found to be due. *Balzer v. General Dynamics Corp.*, 22 BRBS 447, 451 (1989), *aff’d, on recon.*, 23 BRBS 241 (1990). Since EBC has paid the Claimant temporary total disability compensation pursuant to the prior

¹³ The finding that the Claimant’s disability had become permanent does not foreclose the possibility of further modification in the event of some future change in the Claimant’s condition. See *Jensen v. Weeks Marine, Inc.* 346 F.3d 273, 275-277 (2d cir. 2003).

award, it is due a credit for these payments.

3. Interest

Prejudgment interest will be due for any underpayment of compensation. *See Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir.1991) (noting that “a dollar tomorrow is not worth as much as a dollar today” in authorizing interest awards as consistent with the remedial purposes of the Act). *See also Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *reh’g denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991). The appropriate interest rate shall be determined pursuant to 28 U.S.C. § 1961 (2003) as of the filing date of this Decision and Order with the District Director.

4. Attorney’s Fees

Since she successfully defended her right to compensation and established entitlement to modification, the Claimant is entitled to an award of attorneys’ fees under section 28(a) of the Act. *See Lebel v. Bath Iron Works*, 544 F.2d 1112, 1113 (1st Cir. 1976); *Arrar v. St. Louis Shipbuilding Co.*, 837 F.2d 334, 336 (8th Cir. 1988). In my order, I will allow the Claimant’s attorney 30 days from the date this Decision and Order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. § 702.132, and the Employer will be granted 15 days from the filing of the fee petition to file any objection.

IV. Order

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the Employer’s motion for modification is DENIED, the Claimant’s cross-motion for modification is GRANTED, and the following order is entered:

(1) Commencing December 19, 2005, and continuing until further order, the Electric Boat Corporation shall pay to the Claimant permanent total disability compensation based on an average weekly wage of \$835.00, plus the applicable annual adjustments provided in 33 U.S.C. § 910(f) and interest on all past due compensation, computed from the date each payment was originally due until paid and based on a rate determined pursuant to 28 U.S.C. § 1961 (2003) as of the filing date of this Decision and Order with the District Director;

(2) The Electric Boat Corporation shall be allowed a credit pursuant to 33 U.S.C. § 914(j) in the amount of its voluntary payments of temporary total disability compensation since December 19, 2005;

(3) The Electric Boat Corporation shall continue to provide for all reasonable, appropriate and necessary medical care and treatment as the Claimant’s work-related mental condition shoulder injury may require pursuant to 33 U.S.C. § 907, including the care provided by Drs. Bromberg and Kahn;

(4) Counsel to the Claimant shall file within 30 days of the date this decision and order is filed in the Office of the District Director an application for attorney’s fees which complies with

the requirements set forth at 20 C.F.R. § 702.132, and the Employer shall be allowed 15 days after service of the fee application to file any objection thereto; and

(5) All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts